Supreme Court, U.S.
FILED

Docket No. 05-792 DEC 2 5 2005

OFFICE OF THE CLERK

UNITED STATES SUPREME COURT

Lenard A. Footland, Petitioner, *pro se*

v.

Donald L. Evans, Secretary of Commerce, *et al.*, Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for Writ of Certiorari

Lenard A. Footland, Petitioner, *pro se*
833 South 25th Street
Arlington, Virginia 22202
703-308-2683 (w)
703-684-9169 (h)

Questions Presented For Review

1. Is a program of race and gender preferences in hiring and promotion in the federal Civil Service a corrupt violation of the civil service laws, and race and gender discrimination in violation of the Civil Rights Act of 1964 and the Due Process Clause of the 5th Amendment, where there are no facts that could possibly pass strict scrutiny, and the Defendant admits in his Answer (paragraphs 84 and 85) that there is no possible legal justification for such preferences?

2. Is a summary judgment against the Plaintiff justified where he has presented documentary admissions of the Patent Office wherein the Patent

Office has an express program of race and gender preferences, with quotas, wherein he has shown that in selections for Administrative Patent Judge selections three out of four minorities and/or females have been selected, all with the lowest scores of anyone selected, while 12 Caucasian males with higher ranking scores, including Plaintiff, have been passed over for selection; wherein pursuant to said program the percentage of Caucasian male patent examiners, 76% of the labor pool, has dropped from 50 to 36%, where there is a written rating system for managers providing that they can be fired for failure to give preference to minorities and females in hiring and promotion; where Caucasian males are actionably

underrepresented in every category of Patent Office employment; where Patent Office personnel, from the Commissioner to almost all persons involved in the selection process admit that "promoting diversity" means factoring race and gender preferences into all phases of the selection process; and where the selecting official has repeatedly committed perjury and criminal acceptance of documents as legitimate that he knew to be invalid, and where the selecting official has admitted that his pretext for not selecting the Plaintiff was false?

3. Should the Plaintiff's motion for summary judgment have been granted because the above facts precluded any possibility of a selection process "free from discrimination" as required by the Civil Rights Act of 1964?

List of All Parties

Plaintiff pro se: Lenard A. Footland

Defendants: Donald E. Evans, Secretary of Commerce; George W. Bush, President (originally William Clinton); Jon Dudas, Director, U.S. Patent & Trademark Office ("USPTO"); William Stoner, Chief Administrative Patent Judge, USPTO.

Table of Contents

Questions Presented For Review - pp i-iii?

List of All Parties – p 1

Table of Contents – p 2

Table of Cited Authorities- p 3

Citations of Official and Unofficial Reports of the Opinions and Orders Entered in the Case by Courts or Administrative Agencies – p 4

Concise Statement of the Basis for Jurisdiction in This Court – p 5

Constitutional Provisions, statutes, Ordinances Involved in the Case – pp 6-7

Concise Statement of the Case – p 8-10

Direct and Concise Argument Amplifying the Reasons Relied on for Allowance of the Writ – pp 11-14

Appendix – pp 15-16

Table Of Cited Authorities

Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097, 515 U.S. 200 (1995)

Grutter v. Bollinger et al., 000 U.S. 02-241 (2003)

Citations of Official and Unofficial Reports of the Opinions and Orders Entered in the Case by Courts or Administrative Agencies

Transcript of oral opinion of February 5, 2003 by District Judge Ellis in support of summary judgment against Plaintiff (not including ruling on Plaintiff's Motion for Finding of Facts).

Unpublished Opinion, *Footland v. Evans, et al.*, No. 04-1171, 4th Circuit Court of Appeals, August 10, 2004.

Judgment on Rehearing in the above, denied by the 4th Circuit Court of Appeals En Banc, October 27, 2004.

Transcript of opinion and judgment against Plaintiff in EEOC hearing dated February 22, 2000 (EEOC case No.100-99-8073-x, Agency case no's. 100-99-8073-x and 99-56-00244)

Concise Statement of the Basis for Jurisdiction in This Court

28 U.S.C. § 1254 provides that "Cases in the courts of appeals may be reviewed by the Supreme Court by ... writ of certiorari upon the petition of any party to any case ...."

Unpublished Opinion in this *Footland v. Evans, et al.*, No. 04-1171 of the 4th Circuit Court of Appeals, was entered on August 10, 2004.

Judgment on Rehearing in the above was denied by the 4th Circuit Court of Appeals En Banc on October 27, 2004 in the above appeal.

By the rules of the 4th Circuit, the time for filing certiorari is automatically extended to begin starting on the date of judgment of a petition for rehearing.

Constitutional Provisions And Statutes

Due Process Clause of the Fifth Amendment to the Constitution of the United States: "No person shall be ... deprived of life, liberty, or property ... without due process of law ...."

28 U.S.C. § 1254: "Cases in the courts of appeals may be reviewed by the Supreme Court by ... writ of certiorari upon the petition of any party to any case ...."

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e-16(a) et seq., as amended: "All personnel actions affecting employees or applicants ... in executive agencies ... shall be made free from any discrimination based on race, color, religion, sex, or national origin."

Civil Service Reform Act , 5 U.S.C. 4301-4303:

"[A]n agency may ... remove an employee for unacceptable performance."

"'[U]nacceptable performance' means performance of an employee which fails to meet established performance standards in [any] one ... critical element of such employee's position. [Emphasis supplied.]

Concise Statement of the Case

This cause of action alleges race/natural origin and/or gender discrimination, and retaliation against the plaintiff, a Caucasian male Primary Patent Examiner at the United States Patent & Trademark Office ("Patent Office" or "PTO"), in selections of Administrative Patent Judges.

Plaintiff, a Caucasian male, presents that he was a victim of discrimination in two selection rounds in 1996[1] and 1998, most recently and distinctly involving one John Gonzales, a Hispanic male who was preferentially and illegally selected over plaintiff, a Caucasian male, pursuant to

[1] which Plaintiff prosecuted and was denied certiorari by this Court. It is part of this case as part of a pattern of practice along with the 1998 case.

various policies of "promoting diversity", "a government that looks like America", Affirmative Action, and various other euphemisms for policies and practice of preferential hiring and promotion of minorities and females at the Patent Office, said preferential hiring and promotion necessarily illegally discriminating against plaintiff, a Caucasian male.

The Defendants' allegation that there was a "legitimate business reason" for selecting Gonzales: that Gonzales was selected from an electrical technology list to handle electrical technology appeals while Plaintiff had applied for a mechanical technology position, is transparently

pretextual in nature: Gonzales was never ever assigned one electrical case, but rather mechanical ones, as Plaintiff would have been.

The District Court granted summary judgment for the Defendant, which was affirmed by the Court of Appeals, notwithstanding Plaintiff's extensive and highly probative evidence.

Direct and Concise Argument Amplifying the Reasons Relied on for Allowance of the Writ

The Plaintiff refers the Court to the Plaintiff's District Court Opposition to Summary Judgment and Rebuttal, and to his Appeal Brief and Brief in Support of Request for Reconsideration at the Court of Appeals, particularly as to the facts and argument relative to Summary Judgment.

In addition to or in reiteration of the argument on the legality of preferences in the above documents the Plaintiff sketches the following arguments:

This Court's decision in *Grutter v. Bollinger*

et al., is not relevant here. First, that case by its terms did not pass on the question of diversity at the federal level, only deferring to the judgment of the states in state matters. Even on that point, it did not consider the 14th Amendment, which explicitly forbids discrimination by the states. The lead-in to *Grutter* was Judge Stewart's statement regarding diversity in the *Bakke* case, which was *obiter dicta* unnecessary for decision and not binding on this Court.

The Defendant does not pretend that its Affirmative Action preferences meet "strict scrutiny" as required by this Court (*Adarand Constructors, Inc. v. Pena*). Indeed, in its Answer to Plaintiff's Complaint, at paragraphs 84

and 85, it admits that it has no conceivable legal justification for race and/or gender preferences, although when it is not in court it does make the claim that those preferences are justified because it is "good business", raising for this court the question of which of these two opposite positions should control in this case.

A double standard for Caucasians and minorities, and a corruption of the Civil Service into a racial patronage system for the benefit of incumbent officeholders, is prohibited by the Civil Service Act, the Civil Rights Act of 1964, and the

Due Process Clause of the Fifth Amendment.

Respectfully,

Lenard A. Footland

Lenard A. Footland,

Plaintiff *pro se*
833 S. 25th St.
Arlington, VA 22202
(w) 703-308-2683
(h) 703-684-9169

Dated : 11 December 2005

Appendix

1. Unpublished Opinion in No. 04-1171 of 4th Circuit Court of Appeals panel on August 10, 2004, in Appeal from CA-03-487, affirming Summary Judgment in favor of Defendants by District Judge Ellis of the U.S. District Court at Alexandria for the Eastern District of Virginia. See pp.17-19.

2. Judgment on Rehearing Denied by 4th Circuit Court of Appeals En Banc on October 27, 2004 in above appeal, Footland v. Evans, Sec'y, et al., No. 04-1171, (CA-03-487). See pp 55-57.

3. Opinion of Summary Judgment against Plaintiff by District Judge Ellis of the U.S. District Court at Alexandria, Virginia, (transcript of oral opinion), of February 5, 2003. See pp 20-54.

4. Transcript of opinion and judgment against Plaintiff in EEOC hearing dated February 22, 2000 (EEOC case No.100-99-8073-x, Agency case no's. 100-99-8073-x and 99-56-00244).

5. Plaintiff's Petition for Rehearing to the 4th Circuit mailed on or about September 22, 2004.

6. Order granting Judgment in favor of Defendants by District Judge Ellis of the U.S. District Court at Alexandria for the Eastern District of Virginia, dated December 5, 2003. See pp 58-59.

7. Judgment in favor of Defendants by District Judge Ellis of the U.S. District Court at Alexandria for the Eastern District of Virginia, dated December 5, 2003. See pp 60-61.

UNITED STATES COURT OF APPEALS FOR

THE FOURTH CIRCUIT

LENARD A. FOOTLAND,

Plaintiff - Appellant

versus

DONALD L. EVANS, in his official capacity

as Secretary of Commerce,

and

BRUCE H. STONER, JR., in his official

capacity as Chief Administrative Patent

Judge; GEORGE W. BUSH, in his official

capacity as President of the United States,

Defendants

No. 04-1171

August 10, 2004

[UNPUBLISHED]

Before WILKINSON and WILLIAMS, Circuit Judges, and HAMILTON, Senior Circuit Judge.

PER CURIAM:

Lenard A. Footland appeals the district court's order granting summary judgment to Defendant on Footland's claims of race and sex discrimination, as well as retaliation.

We review an order granting summary judgment de novo. Higgins v. E. I. DuPont de Nemours & Co., 863 F.2d 1162, 1167 (4th Cir. 1988). Summary Judgment is appropriate only

when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp v. Catrett, 477 U.S. 317, 322-23 (1986). We view the evidence in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A mere scintilla of proof, however, will not suffice to prevent summary judgment; the question is "not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party" resisting summary judgment. Anderson, 477 U.S. at 251 (1986) (internal quotation marks omitted).

We agree with the district court that Footland failed to demonstrate a prima facie case of unlawful discrimination. See [sic] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 505-06 (1993). We further agree that Footland failed to satisfy the three elements of a prima facie case of retaliation. See [sic] Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996). Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

LENARD A. FOOTLAND, Plaintiff v.

DONALD L. EVANS, et al., Defendants

CIVIL ACTION 03-487-A

December 5, 2004

[Discussion prior to Order of Court omitted.]

[DIST CT OPINION]

...

THE COURT: All right, Mr. Footland and Ms. Ballow, this is now 03-487.

RULING BY THE COURT

THE COURT: This matter is before the Court on the defendants' motion for summary judgment.

Mr. Footland is a Virginia resident and he has been a primary patent examiner at the Patent and Trademark Office for over 24 years and he is a white male. The Donald Evans in the caption is the Secretary of Commerce, the agency that includes the Patent and Trademark Office.

Mr. Footland charges that the department

discriminated and retaliated against him, in violation of Title 7, when it failed to select him for a position as an administrative patent judge with the Patent Office Board of Appeals.

The PTO posted a vacancy announcement for this position in early 1998 and applicants for the positions were required to designate themselves for consideration under three technical disciplines: chemical/biological; second, electrical; third, mechanical, based on the nature of their work and based on their training and expertise.

Plaintiff, Mr. Footland, requested consideration in the mechanical discipline. The other candidates requested consideration in more

than one area.

Now, before selections were made, each applicant was evaluated and scored by a panel of existing administrative panel judges on several relevant criteria and based on the scores that they received in this evaluation,the applicants were ranked and placed into one of three groups, either highly qualified; second, well qualified; or third, qualified. Presumably if there was anyone unqualified, they wouldn't have been put in any groups. But there were three groups: highly qualified, well qualified, qualified and the PTO created three lists, then, of qualified applicants, one for each of the three technical disciplines.

After the applicants had been scored and ranked, the three lists of highly qualified applicants were forwarded to Bruce Stoner, who was the chief administrative panel [sic, patent] judge and the selecting official in this case.

Now, the list that Stoner was sent did not include the scores or the rankings. Rather, the applicants [sic] names were on the list in alphabetical order.

After reviewing the applicants' files, originally Stoner selected seventeen applicants from the highly qualified lists in late 1998. He chose all eight applicants from the chemical/biological list, nine applicants from the

electrical list, and none at that time from the mechanical list.

After several selectees failed to accept their appointments – presumably these seventeen were offered – he selected two additional applicants, one from the electrical list, one from the mechanical list – I beg your pardon – two – yes, one from the electrical list, one from the mechanical list.

Ultimately, fourteen accepted appointments. Now, of the fourteen who accepted appointments, nine were Caucasian males, three were females, white females, and one was an Asian male, one was a Hispanic male. I don't understand what the difference is between Caucasian and Hispanic, but

maybe there is some difference.

In fact, Stoner claims he believed the Hispanic male was Caucasian, and by some definitional basis he may well have been.

I suppose it would determine on whether his Hispanic descent was based on Indian or African descent from somewhere in Latin America, or whether – if he is from Spain, entirely, then it was probably Caucasian. It underscores some of the sad aspects of these so-called racial qualifications.

At the time of the selection, the case load of the Board of Appeals was about 9,000 cases and about 50 to 60 percent of them were chemical/biological and the remaining 5 to 20 percent were mechanical.

When the plaintiff learned that he hadn't been selected, he filed a discrimination complaint in the agency, charging the agency with race, gender, national origin discrimination and age discrimination as well with retaliation, predicated on his unsuccessful discrimination complaints in 1996, when he was previously not selected as an APJ during an earlier selection process.

When he learned that he had not been selected on this occasion, when Stoner made the additional selections in early 1999 – that is, when he picked the other two people, he filed a second complaint alleging similar charges.

These were ultimately consolidated. There was an EEO hearing and he appealed that decision. That was rejected. It is now here de novo.

What he wants is a retroactive appointment as an APJ and an injunction against the defendants and a declaration that diversity programs are unconstitutional.

What he specifically allegation [sic, alleges] in this case is that he was discriminated against on the – based on race and gender when Gonzales, a Hispanic male, and Barr, a white female, were selected as administrative panel [sic, patent] judges instead of him.

He says Gonzales' selection from the list of highly qualified was discriminatory because Gonzales was only qualified in the mechanical discipline and was less qualified than the plaintiff because he really received a lower score and was

not a patent examiner at the time of selection, but instead handled procedural petitions.

He says – the plaintiff says that Gonzales was placed on and selected from the electrical list fraudulently, so that the PTO could manufacture a legitimate nondiscriminatory reason for discriminating against the plaintiff on the basis of race, namely the PTO's need for individuals with electrical knowledge and expertise. He says that Gonzales' selection from the electrical list was a fraud and a sham.

He doesn't allege that Lal, unlike Gonzales, was qualify [sic, qualified] and selected for his electrical expertise as well as mechanical

technology.

Now, the plaintiff also points to the existence of this agencywide diversity program which – and he says that as a part of that, selecting officials were required to increase diversity of their work forces and he says that this is what caused the discrimination against him.

The department specifically stated that there is to be recruitment and promotion of department employee [sic, employees] of all ages, social classes, ethnicities, genders, sexual orientations, disabilities, races, religions, languages and other classifications not affecting their abilities to help carry out the mission of the department. That's what the formal policy is.

Now, this matter is here on summary judgment and the standard to be applied is, of course, well settled in the trilogy of cases, including Anderson and Celotex, and the real question is whether there are specific facts showing that there is a genuine issue for trial. The plaintiff's hunches aren't sufficient.

Now, he claims that he was discriminated when Gonzales, the Hispanic male, was selected over him and that he was discriminated on the basis of gender when Barr was selected over him.

Basically, in a race and gender discrimination claim, the plaintiff may prove it either directly or indirectly and the indirect proof

scheme is, of course, that set forth in the McDonnel-Douglas, Burdine cases and to prove indirect disparate treatment the plaintiff has to establish a prima facie case of discrimination.

If he does so, the burden of production shifts to the defendant to show a legitimate nondiscriminatory reason for the employment action and then the burden ultimately of persuasion rests on the plaintiff to show that there is a factual issue presented as to whether that legitimate nondiscriminatory reason is pretextual, under the Reeves case.

If a legitimate nondiscriminatory reason is offered, then the burden of course shifts back to

the plaintiff to show it's pretextual and it's the – what the plaintiff has to show then is that there , that there is some issue of fact on whether it's pretextual, that is, some issue for trial.

Now, the prima facie case, the plaintiff can show that he is a member of a protective [sic, protected] class -- whites are protected as well – he was qualified and that he was rejected under circumstances giving rise to an inference of lawful discrimination. The burden of proving this is not particularly onerous.

The government argues in this case that the plaintiff must present additional evidence beyond the prima facie case in a reverse discrimination case.

That's not correct. I don't find that a higher prima facie burden applies to majority plaintiffs. So, that argument does not prevail.

However, other circuits have reached a different result, but that does not obtain in this circuit. The Fourth Circuit has made clear that Title 7 protects whites as well as minorities and it has not yet decided that a higher prima facie burden applies to majority plaintiffs and I reject that it should.

So the question is whether the plaintiff has established the four elements of the prima facie case and then whether there is a legitimate nondiscriminatory reason and then whether there is any triable issue of fact as to whether that

egitimate nondiscriminatory reason is pretextual.

The first three elements of the prima facie case are undisputedly shown. He is a member of a protected racial class. As I have said, whites are protected.

He applied for a vacant position and he was qualified for that position based on his training and experience as a mechanical engineer, his position as a patent examiner and his ranking by the selection panel is highly qualified.

The next question is: Does he offer evidence to show that he was rejected for that position under circumstances giving rise to an inference of unlawful discrimination? This is the fourth element of the prima facie case.

In this regard, the plaintiff offers the following evidence in an attempt to create an inference of unlawful discrimination: First, that the selection of Gonzales, a Hispanic male, and Lal, an Asian male -- female -- no, Lal, Asian male, the only the only two highly qualified minority applicants on the electrical list; two, the selection of Gonzales, who had received the lowest score on the highly qualified list; next, the selection of two African-American applicants from the chemical/biological list during the 1996 selection; next, the existence of an agencywide diversity policy designed to increase the diversity of the agency's work force.

I should point out that none of the evidence that the plaintiff offers regarding this diversity policy indicates that the policy required any PTO official to hire or to promote minorities over white applicants.

The next thing that the plaintiff cites is that the requirement that PTO managers and officials implement the diversity policy by promoting a diverse work force. In this regard, plaintiff contends that because of their -- because their commitment and implementation of this diversity policy was a critical element on which their performance would be reviewed, that these PTO managers would either be fired or not promoted if they failed to comply. That's what he alleges.

But there is no evidence that the department's policy required the firing of a noncompliant manager.

In any event, the next thing that the defendant argues -- or the plaintiff argues is that the requirement -- or [sic, is?] the fall in the percentage of Caucasian male examiners, but not patent judges, from 50 to 38 percent between 1996 and 2000.

This, he argues, is evidence of a pattern and practice of discrimination; could be relevant.

Taken all together, in the Court's view this does not create the requisite inference of unlawful discrimination then whether there is any triable issue of fact as to whether that legitimate

nondiscriminatory reason is pretextual.

The first three elements of the prima facie case are undisputedly shown. He is a member of a protected racial class. As I have said, whites are protected.

He applied for a vacant position and he was qualified for that position based on his training and experience as a mechanical engineer, his position as a patent examiner and his ranking by the selection panel is highly qualified.

The next question is: Does he offer evidence to show that he was rejected for that position under circumstances giving rise to an inference of unlawful discrimination? This is the fourth element of the prima facie case.

In this regard, the plaintiff offers the following evidence in an attempt to create an inference of unlawful discrimination: First, that the selection of Gonzales, a Hispanic male, and Lal, an Asian male -- female -- no, Lal, Asian male, the only the only two highly qualified minority applicants on the electrical list; two, the selection of Gonzales, who had received the lowest score on the highly qualified list; next, the selection of two African-American applicants from the chemical/biological list during the 1996 selection; next, the existence of an agencywide diversity policy designed to increase the diversity of the agency's work force.

I should point out that none of the evidence that the plaintiff offers regarding this diversity policy indicates that the policy required any PTO official to hire or to promote minorities over white applicants.

The next thing that the plaintiff cites is that the requirement that PTO managers and officials implement the diversity policy by promoting a diverse work force. In this regard, plaintiff contends that because of their -- because their commitment and implementation of this diversity policy was a critical element on which their performance would be reviewed, that these PTO managers would either be fired or not promoted if

they failed to comply. That's what he alleges.

But there is no evidence that the department's policy required the firing of a noncompliant manager.

In any event, the next thing that the defendant argues -- or the plaintiff argues is that the requirement -- or the fall in the percentage of Caucasian male examiners, but not patent judges, from 50 to 38 percent between 1996 and 2000.

This, he argues, is evidence of a pattern and practice of discrimination; could be relevant.

Taken all together, in the Court's view this does not create the requisite inference of unlawful discrimination to meet the requirement of the prima facie case, particularly given that Gonzales

and Lal were selected at the same time as 17 Caucasian APJs and, furthermore, Stoner had no access to the panel's scores at the time he made his selection.

Plaintiff assumes that because Stoner reviewed the files of the applicants, that he should have come to similar conclusions regarding the qualifications of the applicants as did the panel that scored them and, therefore, it shouldn't matter that he didn't see their scores.

Given the fact, however, that there is nothing in this record that shows that the scores correlate perfectly with what would have been seen with something that's in the file, it's certainly

reasonable that Stoner could have come to different conclusions regarding the applicant's relative qualifications, particularly, as I said, given the intangible things that can be taken into account in addition to scores.

So, it's the Court's view that the evidence that the plaintiff adduces, from which he says he is entitled to an inference of discrimination, in the Court's view doesn't warrant that inference. It's no more likely than not likely and therefore, is not a probative inference.

Even assuming that plaintiff could establish the prima facie case, then we turn to see whether there is sufficient evidence of pretext of the legitimate nondiscriminatory reasons. There are

three that are offered with respect to Gonzales.

The first is that he was on both lists. He was listed as highly qualified to work on a wider variety of cases, given -- giving the Patent Board greater flexibility in assignment and the fact that many of the cases -- more cases are electrical, higher percentage of cases are electrical than mechanical.

So, there was arguably a greater need for judges who work on electrical cases. He was qualified to do so, whereas the plaintiff was not. Or at least on paper Gonzales was qualified to do so.

Stoner didn't have access to the scores when he made selection and he believed, based on his

own assessment of the files and interviews, that Gonzales was more qualified than plaintiff.

That's a judgment he is entitled to make. In other words, the ultimate determination is not a matter of numbers. It is a matter of numbers plus a judgment made on some intangibles.

Plaintiff contends that the proffered legitimate nondiscriminatory reasons are pretextual. He argues that Stoner fraudulently placed Gonzales on the electrical list, even though he was only qualified as a mechanical engineer, and that he did so to manufacture this legitimate nondiscriminatory reason.

In support, he offers evidence to show that throughout Gonzales' career in this new job he was

given mechanical and chemical cases, not electrical ones. He points out that of the first 33 cases that he authored, 7 were classified as chemical and 25 as mechanical and one was a miscellaneous case. Of the 77 cases that he has authored throughout his career, only 3 were classified as electrical.

In those cases where he served as a panel member, he argues there is a virtual absence of cases classified as electrical.

So plaintiff offers this evidence to show that the proffered legitimate nondiscriminatory reasons are pretextual and he says Gonzales' assignment to chemical and mechanical cases suggests that the contention that Stoner selected Gonzales to address

the electrical case load is pretextual.

This does not show that when Stoner made the decision to pick Gonzales, that he wasn't qualified to do electrical work or that his belief that he was more qualified than the plaintiff was not a legitimate one to reach.

The fact that Gonzales scored only three points lower than plaintiff on a hundred point scale shows how close these things are and, of course, Stoner didn't have that three point difference.

I am not persuaded that the fact that he is assigned all these chemical and mechanical cases and not electrical cases means that he was deliberately placed on both lists to create this reason.

On sex discrimination, with respect to Barr, here the plaintiff offers the following evidence to create an inference of sex discrimination: The selection of Gross, a white female, from the highly electrical -- highly qualified electrical list, over four white males who had scored higher on the electrical list; the selection of Barr, the only white female, over two white males who had scored higher on the mechanical list and six males on the highly qualified electrical list; the selection of two of four of the female applicants, but only two of thirteen of the male applicants from the chemical/biological list.

It's true that evidence of a pattern and practice can be used to establish this. That's why I

reviewed it and the previous one.

Also, the selection of Mariel [sic, Murriel] Crawford, a black female who had the lowest score on the mechanical list and the agency's policy of diversity to promote recruitment and promotion of department of department employees of all gender.

Here again, this evidence doesn't create the requisite inference of unlawful discrimination in the selection of Barr over the plaintiff. So this prima facie case fails, too, and this is so particularly given that Barr was selected at the same time as sixteen male applicants were selected and Stoner did not have, again, as I said before, access to the relative scores of the applicants when he made his decisions.

So, here again in the Court's view there is no prima facie case and, again, there is a legitimate nondiscriminatory reason.

Here, Barr was selected over other candidates because she was particularly well-suited for that position. She had obtained a degree from MIT, worked as an engineer and a law clerk outside the agency and demonstrated strong writing skills. None of that is demonstrated to be pretextual.

Defendant also points out that Barr was selected from the mechanical list only after Stoner had made eighteen selections from the chemical/biological and electrical lists, five of

which had been turned down. In other words, she was even a second choice.

So there is no showing that there is a pretext as to these legitimate nondiscriminatory reasons.

As for the retaliation claim, to prove retaliation, of course, the plaintiff must show that he engaged in protected activity, that he suffered an adverse employment action and that there is a causal connection between the two.

Here, it's clear that he did engage in protected activity, because he filed an EEO complaint in 1996 after that year's APJ selection. He also suffered an adverse employment action when he was not selected.

It is not an adverse employment action,

however, to have someone selected from an electrical list rather than the mechanical list, but it is an adverse employment action for him not to have been selected as an APJ.

So the real question is whether there is evidence on this record of a causal nexus between the protected activity in 1996 and, two and a half or so years later, his failure to be selected.

The Court's view is that the cases are pretty clear that that kind of time interval is sufficient to not raise -- it does not raise any inference of causation.

There is a legitimate nondiscriminatory reason here as well, as I have already reviewed, in terms of Barr being more qualified and the like.

So -- and there is no evidence that it is pretextual.

So, it's the Court's view that the motion for summary judgment in this case must be granted. I will enter an order accordingly.

Of course, Mr. Footland, you have the right to appeal this case to the Court of Appeals within 30 days of today.

Anything further, Ms. Ballow?

ATTORNEY BALLOW: No -- but I believe Mr. Footland has 60 days.

THE COURT: Sixty days. You are exactly right, it is 60 days.

(Court recessed in Footland v. Evans, et al.)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

October 27, 2004

No. 04-1171

CA-03-487

LENARD A. FOOTLAND

Plaintiff – Appellant

v.

DONALD L. EVANS, in his official capacity as Secretary of Commerce

Defendant – Appellee

and

BRUCE H. STONER, JR., in his official capacity as Chief Administrative Patent Judge;

GEORGE W. BUSH, in his official capacity

As President of the United States

Defendants

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Williams, Judge Wilkinson, and Senior Judge Hamilton.

For the Court,

/s/ Patricia S. Connor

CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

LENARD A. FOOTLAND	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No.**
	)	
DONALD L. EVANS, et al.	)	**03-487-A**
	)	
Defendant [sic].	)	

ORDER

The matter came before the Court on defendant's [sic] motion for summary judgment.

For the reasons stated from the bench,

It is **ORDERED** that defendant's [sic] motion for summary judgment is **GRANTED**.

The Clerk is directed to send a copy of this Order to plaintiff and all counsel of record.

The Clerk is directed to enter judgment pursuant to Rule 58, Fed. R. Civ. P., and place this matter among the ended causes.

Should the plaintiff wish to appeal this Order, he must do so within sixty (60) days pursuant to Rules 3 & 4, Fed. R. App. P.

s/_____

T.S. Ellis, III

United States District Judge

Alexandria, Virginia

December 5, 2003

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

LENARD A. FOOTLAND	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	
DONALD L. EVANS, et al.	)	03-487-A
	)	
Defendant [sic].	)	

JUDGMENT

Pursuant to the order of this Court entered on December 5, 2003 and in accordance with Federal Rules of Civil Procedure 58, JUDGMENT is hereby entered in favor of the defendant Donald

L. Evans, against the plaintiff Lenard A. Footland.

ELIZABETH H. PARET, CLERK

By: s/ [illegible]

_____

Deputy Clerk

December 5, 2003

Alexandria, Virginia